

DEPARTMENT OF TAXATION AND FINANCE

CORPORATION TAX BUREAU

REPORT ON PRELIMINARY HEARING

Smith Miller & Patch, Inc.
Smith Miller & Patch, Inc.

In the Matter of the Petition

of

SMITH, MILLER & PATCH, INC.

Petition No. 164

for redetermination of deficiency
of franchise tax under Article 9-A
of the Tax Law for the calendar
years 1964, 1965 and 1966.

Based on a field audit report of the New York Office, notices of deficiency were issued on November 18, 1968, computed as follows:

	<u>1964</u>	<u>1965</u>	<u>1966</u>
Entire net income reported	\$524,423.13	\$658,196.00	\$629,927.00
Business allocation % as adjusted	21.0754	20.8899	20.7845
Allocated income	110,524.32	137,489.90	130,927.18
Tax at 5½%	6,078.84	7,561.94	7,200.99
Tax paid	1,265.64	1,529.00	1,428.00
Deficiency	4,813.20	6,032.94	5,772.99

The only adjustment made was an increase in the business allocation percentage on the theory that shipments were made from regular places of business (not permanent or continuous places) and all orders were deemed received or accepted in New York. Accordingly, shipments into New York were allocated 100% to New York and shipments from points outside New York to other points outside New York were allocated 50% to New York.

The taxpayer filed a timely petition for redetermination of deficiency and a preliminary hearing was held in New York City on June 26, 1969 before J. J. Genevich.

The information on file discloses that all goods are manufactured outside New York and all shipments are made from points outside New York. The taxpayer sells ethical drug products which are manufactured at New Brunswick, New Jersey, by Carroll, Dunham, Smith Pharmacal Corp., an affiliated company. Taxpayer sells 95% of the production of Carroll, Dunham, Smith and the remaining 5% is sold by another affiliated company. Shipments to customers are made from the New Brunswick plant and from public warehouses located in other states.

Orders throughout the country are solicited by salesmen and forwarded by them to New Brunswick or the public warehouses for filling. The salesmen and their regional sales managers operate out of their own homes. The taxpayer files income or franchise tax returns in all the states from which shipments are made.

The administrative office of the taxpayer is located in New York, but this office is maintained by the employees and facilities of its parent corporation, Nestle-Le Mur Co., for which the corporation pays a service charge. The one employee of the taxpayer connected with the New York office, the sales manager, spends the bulk of his time at the affiliate's plant in New Brunswick, N.J.

The taxpayer does not have a place of business in New York which qualifies as a permanent or continuous place since the administrative office is maintained by the employees and facilities of the parent company. Accordingly, it is debatable whether we can take the position that all orders are deemed received or accepted in New York. A Law Bureau opinion on Novita Mines Corporation (enclosed) holds that the technical clause (chiefly connected with, etc.) which permits us to reach out and encompass activities carried on beyond the borders of New York, cannot be invoked if the taxpayer does not have a permanent or continuous place of business in New York.

Moreover, I don't believe we can completely establish that the regional sales managers and public warehouses are chiefly connected with the New York address. The overall sales manager spends the bulk of his time in New Brunswick, N.J., and taxpayer's brief states that he prepares price lists and sales manuals at that location. A reproduced copy of a warehousing agreement dated September 14, 1966 submitted to us indicates that the agreement was executed on behalf of the taxpayer at New Brunswick, N.J. The main point in our favor connecting the regional sales managers and public warehouses with the New York address is the fact that the manuals used by the public warehouses are prepared by the accounting and credit departments of the parent corporation, Nestle-Le Mur Co., in New York. In the daily routine followed from day to day, such as with respect to matters of accounting, collection and credit, the public warehouses deal with the New York address.

Because of the Law Bureau Opinion cited above, and in view of the fact that this will not be a recurring issue, since receipts are allocable on a destination basis beginning with the calendar year 1968, I believe we should accept the receipts allocation as filed. The equities are all on the side of the taxpayer. It filed returns in those states from which shipments were made, and the sales were actively and physically solicited in those states by employees (not independent agents) of the taxpayer.

Based on the foregoing, it is recommended that the notices of deficiency in the respective amounts of \$4,813.20 for 1964, \$6,032.94 for 1965 and \$5,772.99 for 1966 be cancelled. There will not be any cash refund involved since the taxpayer did not make payment.

/s/ J. J. Genevich

J. J. Genevich
Hearing Officer

JJG:MB
5/22/70

Approved: /s/ E. A. Doran
 /s/ Milton Koerner - 6/2/70
 /s/ A. B. Manley - 6/5/70